PUBLIC PROSECUTOR

v.

ONG KHOON SENG

HIGH COURT BORNEO, KUCHING
GEORGE SEAH J
[CRIMINAL APPEAL NO. KG3 OF 1981]
23 OCTOBER & 7 NOVEMBER 1981

CUSTOMS AND EXCISE: *Fraudulent evasion of duty - Charge under Customs Act 1967, s. 135(1)(g) - Whether trial Court has jurisdiction to discharge and acquit accused on payment of deficient customs duty - Section 17 - Whether administrative in nature.*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Submission of no case to answer - Whether defence permitted to make submission of no case to answer - Whether prosecution allowed to reply - Whether Court must hear such submissions at this stage.*

The respondent was charged in the Magistrate's Court under s. 135(1)(g) of the Customs Act 1967 ('the Act') for the fraudulent evasion of customs duty in respect of a motor vehicle. At the close of the case for the prosecution, whilst counsel for the respondent was in the process of submitting no case to answer, the Magistrate stopped him on the ground that there was no provision in the law requiring the Court to hear such a submission. The Magistrate then proceeded to rule that the appellant had failed to make out a prima facie case against the respondent. In the result, the Magistrate acquitted and discharged the respondent, and further ordered the respondent to pay the under-collection pursuant to s. 17 of the Act upon which payment the motor vehicle would be returned to him. The appellant appealed to the instant Court.

Held:

[1] On the facts of the instant appeal, the appellant had made out a prima facie case against the respondent which, if unrebutted, would warrant his conviction.

[2] The provisions of s. 17 of the Act are administrative in nature. Thus, when an accused person is charged under s. 135(1)(g) of the Act, the trial Court has no jurisdiction to discharge and acquit the accused upon payment of the deficient customs duty. It is the Customs Department and not the trial Court which should exercise this power.

[3] Although there is no express provision in the Criminal Procedure Code permitting the defence to make a submission of no case to answer or for the trial Court to hear such a submission at the close of the case for the prosecution, the practice of the Courts in this country has always been to allow the defence to make such a submission if it so desires and to permit the prosecution to reply to it. Both the defence counsel and the DPP are officers of the Court and they are there to assist the Court. It is of fundamental importance that justice should both be done and be manifestly seen to be done.

[Appeal allowed, order of Magistrate quashed, and Magistrate directed to call on respondent to enter upon his defence.]

Cases referred to:
Mahindar Singh v. PP [1941] MLJ 230
R. v. Sussex Justices, ex parte McCarthy [1924] 1 KB 256

Legislation referred to:
Customs Act 1967, ss. 17, 135(1)(g), (i)

For the appellant - Abang Abdul Rahaman bin Datuk Haji Abdul Rahim, DPP standing in for Nik Hashim bin Nik Abdul Rahman, DPP

For the respondent - Benedict Lim standing in for David Tiong; David Tiong & Michael Tiong

JUDGMENT

George Seah J:

In this case, the respondent, Ong Khoon Seng, was charges as follows:

> That You, on 27 day of May 1978 at Customs Office, Kuching Port Authority, Tanah Puteh, Kuching, First Division, Sarawak were knowingly concerned in a fraudulent evasion of customs duty, to wit, RM13,339.78 leviable by law, being the difference of customs duty assessed by customs amounting to RM22,959.78 as against the customs duty calculated from Import Declaration No. 112242 dated 27 May 1978, amounting to RM9,620 on one unit of new motor vehicle (Porsche Coupe 924) Chassis No. 9246106573 and Engine No. YJ 001144 imported into Sarawak from Singapore and you thereby committed an offence under s. 135(1)(g) and punishable under s. 135(1)(i) of the Customs Act 1967.

At the close of the prosecution case while defence Counsel was in the process of submitting no case to answer, the trial Magistrate stopped him and the record reads:

> (Mr. Tiong agreed that there was no provision in the law to say the Court must hear the defence submission at the close of the pro. case).

And without hearing the prosecution the trial Magistrate proceeded to rule that the prosecution have failed to make out a *prima facie* case, acquitted and discharged the respondent. The trial Magistrate also ordered the respondent to pay the under collection under s. 17, i.e. RM13,399.78 and upon payment the Porsche car No. KH3322 shall be returned to him. The Public Prosecutor was dissatisfied with this ruling and has appealed to the High Court on various grounds.

Briefly, the facts adduced by the prosecution before the trial Court are these:

(a) On 27 May 1978, the respondent produced a signed Import Declaration (Ex. P13) indicating that he had imported into Sarawak from Singapore one unit of new Porsche 924 motor-car and the value was given to be RM14,800. As this was the first time that a Porsche 924 Coupe was imported into Sarawak the Customs did not know its proper value. However, the Customs allowed the said Porsche to be released subject to (a) tile respondent producing the invoice on 29 May 1978, and (b) if there should be an uplift of value, the respondent agreeing to pay the difference.

(b) On 29 May 1978, the respondent did not produce the invoice but a letter from Ngo Hock Auto Spares Co. (Pte.) Ltd. Singapore, was tendered purporting to show the CIF value of the Porsche to be RM14,800 (Ex. P18).

(c) The Customs were not satisfied with this and mounted an investigation culminating in the discovery of certain documents which showed the FOB price of the said Porsche 924 Coupe to be RM530,439.31 (Ex. P23) and this invoice from Ngo Hock Auto Spares Co. (Pte.) Ltd., Singapore, was dated 16 May 1978. The Customs also found 5 receipts from Ngo Hock Auto Spares Co. (Pte.) Ltd. Singapore amounting to a total of RM530,439.31 made out in the name of the respondent (Ex. P24, 24(a) and 24(b)). That this payment of the sum of RM530,439.31 was in fact made was corroborated by remittances sent to Singapore by a local bank (Ex. P27 and P27(a), P28 and P28(a)) dated 31 January 1978 and 19 April 1978 respectively.

(d) The prosecution contended that all these relevant documents were in the custody or possession of the respondent when he submitted the Import Declaration to the Customs Department on 27 May 1978, and that he also had knowledge of these said documents, inasmuch as on 1 February 1978, he had entered into an agreement in writing to sell the said Porsche 924 Coupe to Goh Leng Chua for the sum of RM52,000 and full payment of the purchase price had been made (see Ex. P8, P9, P9(a) and P9(c)).

(e) As regards the state of mind of the respondent at the material times, the prosecution relied on 2 documents which tended to prove that the respondent had hatched a scheme to defraud the Customs, *viz*: Import Licence (Ex. P14) and Insurance policy (Ex. P10). It was pointed out that a special condition was imposed in Ex. P14 which stipulated that the said Porsche 924 Coupe could not be sold or transferred within a period of 2 years and yet the respondent had disposed of the said vehicle to Goh Leng Chua on 1 February 1978. Secondly, the said Porsche car left Singapore for Kuching on or about 23 May 1978 and the respondent took out a policy of insurance from South East Asia Insurance Bhd. on 26 May 1978, in Kuching to insure the said vehicle for the sum of RM18,000. It is the contention of the prosecution that this was a feeble attempt by the respondent to try to pass the value of the said Porsche car at RM14,800.

Senior Federal Counsel has submitted that on these facts the prosecution have made out a *prime facie* case against the respondent as charged, if unrebutted, would warrant his conviction. After reading the oral as well as the documentary evidence produced before the lower Court, I am inclined to agree with this submission. For these reasons I quash the order of the trial Magistrate discharging and acquitting the respondent and direct him to call the respondent to enter upon his defence.

There is one other matter I like to mention. I agree with the contention of the Senior Federal Counsel that the provisions of s. 17 of the Customs Act 1967, are administrative in nature and that when an accused person is charged under s. 135(1)(g) thereof the trial Court has no jurisdiction to discharge and acquit the accused on payment of the deficient customs duty. In short, it is the Customs Department and not the trial Court which should exercise this power.

Although there is no express provision in the Criminal Procedure Code permitting a defence Counsel to make a submission of no case to answer or for the trial Court to hear such a submission at the close of the prosecution case, the practice of the Courts in this country has always been to allow defence Counsel to make such a submission if he so desires and for the trial Court to permit the Deputy Public Prosecutor to rely to such a submission. It should be remembered that both defence Counsel and the Deputy Public Prosecutor are officers of the Court and they are there to assist the Court. In this connection, I would like to refer to the case of *Mahindar Singh v. PP* [1941] MLJ 230 where Terrell Ag CJ said:

> ... The eighth ground of appeal alleges that the accused's Counsel was never given an opportunity of addressing the Court at the close of the case. This is admitted by the learned Deputy Public Prosecutor and constitutes a serious irregularity. In view of this there is no necessity to enter into the merits of the conviction. The appeal will be allowed, the conviction set aside and a new trial ordered.

I myself had occasion to deal with this matter in Kuching Criminal Appeal No. K7/79 where I said: "In this connection, I would like to quote a well-known *dictum* of Lord Hewart in *R. v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 that 'it is of fundamental importance that justice should both be done and be manifestly seem to be done'.

The appeal is allowed.

Also found at [1982] CLJ 83